83-5815

Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 83-

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

STEVEN ROY HARPER,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

BRIEF OF RESPONDENT IN
OPPOSITION TO CERTIORARI

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STATEMENT OF THE CASE

Sometime between 8:00 p.m. September 9, 1978, and 1:00 p.m. September 10, 1978, the petitioner, Steven Roy Harper, broke into a home in Omaha, Nebraska, and placed a significant quantity of a known carcinogenic substance in containers of milk and lemonade located in the refrigerator of that residence (Petitioner's App. A, 208 Neb. 570-571). Various members of the family who resided in that home and their guests ingested the poisoned fluids on September 10, 1978. On September 12, 1978, eleven month old Chad Shelton died as a result of consuming poisoned milk (Petitioner's App. A, 208 Neb. 571). On September 15, 1978, Duane Johnson died as a result of consuming the poisoned lemonade (Petitioner's App. A, 208 Neb. 572). Harper was not arrested until October 13, 1978, and never provided any information to authorities which did or could have saved the lives of his two victims (Petitioner's App. A, 208 Neb. 573).

Subsequent to his arrest Harper voluntarily confirmed, when questioned by the police, the identity and quantity of the lethal substance he had placed in the Johnson residence. The trial court suppressed this testimony during the guilt phase of the trial (Petitioner's App. A). At the sentencing phase of the proceedings the trial court considered the information Harper had provided the authorities but declined to conclude that his actions, in view of the actual victims of these homicides, rose to the level of being deemed a mitigating circumstance or consideration in passing sentence (Petitioner's Brief, p. 11; Order of Sentence, p. 19-20).

> Therefore, the court finds that very little weight should be given to the defendant's subsequent admissions, since he failed to act at a time when such information was essential to the survival of Duane Johnson and Chad Shelton and to the complete recovery of Bruce and Sallie Shelton and Sherrie Johnson.

Id.

In Harper's state court challenge to the effectiveness of his trial counsel he did not assert the particular corruption of trial counsel's ineffectiveness urged for the first time in this proceeding (Brief of Appellant, Supreme Court of Nebraska, Case

No. 82-7241. Harper's contention at that juncture was that his counsel was ineffective by allowing certain disclosures in the presence of the trial court, not that his trial counsel had failed to bring these matters to the trial court's attention. Id. The language cited at page 18 of Harper's petition was made solely as an aside to buttress the argument actually raised, considered, and rejected by that court (Petitioner's App. A, 214 Neb. 915).

We strenuously disagree with Harper's characterization of the issues presented the court below for decision (Petitioner's Brief, p. 18-19). He attempts to place before this court, by a petition for certiorari, an issue never specifically placed before the court whose decision they now seek to have reviewed. In fact, that issue was never even before the trial court which performed the fact finding function in this instance (Petitioner's App. E, paragraph 1).

ARGUMENT

I.

THIS COURT SHOULD NOT FUNCTION AS THE ORIGINAL FACT FINDER ON THIS ISSUE.

A.

It is interesting to note that Harper now seeks, through yet another set of counsel, to have this court concern itself not with an appellate or constitutional question, but to function as the original fact finder on a previously unlitigated issue. The question of whether Harper received constitutionally adequate counsel during his penalty phase proceedings was not before the state trial court when his conviction was reviewed under Neb.Rev.Stat. §§29-3001 et seq. (Reissue 1979). See, Petitioner's App. E, paragraph 1. The subject was only broached in passing in Harper's brief on appeal. Yet he now requests this court to "determine whether petitioner was denied effective assistance of counsel at the penalty phase of his capital trial." Petitioner's Brief, p. 20. This type of question cannot and should not be raised or resolved for the first time before this court. Harper should not be afforded a broader scope of challenges here than he would arguably be able to present a federal district court under 28 U.S.C. §2254.

As Harper noted in his brief below:

> This argument is divided into two parts. The first will consider whether or not Mr. Corrigan acted as effective counsel in the investigation and preparation of a plea of insanity. The second part will consider whether or not Mr. Corrigan acted effectively in regards to the procedure we call the "disclosure hearing".

State v. Harper, 214 Neb. 911, 336 N.W.2d 597 (1983), Brief of Appellant, p. 15. The editing of Harper's present counsel (Brief of Petitioner, p. 18-19) cannot disguise the simple fact that an issue is being raised at this juncture for the first time.

B.

Second, Harper's entire factual premise is not only untimely raised here, but it is inaccurate. The trial court in this matter had available to it, at the time of the penalty phase

hearings, the testimony Harper here claims should have been presented. The trial judge had heard that testimony at suppression hearings prior to when the guilt phase began. Furthermore, the language of the sentencing order clearly demonstrates that Harper's cooperation following the deaths of Chad Shelton and Duane Johnson was before the court, was considered and weighed by the court, but found not to rise to the level of a mitigating circumstance (Petitioner's Brief, p. 11, Order of Sentence at 19-20).

II.

BURDEN OF PROOF ON QUESTION OF EFFECTIVE ASSISTANCE OF COUNSEL.

We will not argue here that there are not varying standards employed allocating the criminal's burden of proof on the issue of effective assistance of counsel. We do believe that this case, in its present context, presents a poor record upon which to address that question.

First, we believe, regardless of which standard is employed, this case does not support a finding of constitutionally inadequate assistance of counsel. Second, Harper's entire argument here is based upon questions of fact which have never been addressed or resolved by a state fact finder, a state appellate court, or a federal trial court. This is not, in our estimation, an appropriate forum to argue or resolve factual questions, yet on the present record that is exactly what must occur before the legal issue may be reached.

If a split of authority does exist, as alleged by Harper, this case would presently prove a poor vehicle by which to resolve that matter.

III.

REGARDLESS OF THE STANDARD EMPLOYED, PETITIONER'S TRIAL WAS CONSTITUTIONALLY ADEQUATE.

The standard for evaluation of the effectiveness of Harper's counsel which was employed by the Supreme Court of Nebraska is the same standard urged upon that court by Harper below. We believe, in view of the Supreme Court of Nebraska's comments upon the resolution of this matter (Petitioner's App. C, 214 Neb. 916-917), that regardless of the standard employed the result in this case will remain the same. There is no reason to believe that an application of the standard articulated in Hawkman v. Parratt, 661 F.2d 1161, 1167 (8th Cir. 1981) would in any respect alter the outcome in this matter.

For each and all of the foregoing reasons we urge this court to deny the writ prayed for here by the petitioner.

STATE OF NEBRASKA, Respondent.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing brief for respondent in opposition to petitioners upon the petitioner herein by placing same copy in the United States Mail, first class postage prepaid, addressed to petitioner's attorneys of record, James E. Lobsenz, 812 Smith Tower, Seattle, Washington 98104; Timothy K. Ford, 600 Pioneer Building, Seattle, Washington 98104; and Vincent Powers, 134 South 13th Street, Suite 1214, Lincoln, Nebraska 68508. Dated this 29 day of December, 1983.

Patrick T. O'Brien
Deputy Attorney General